STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONALD MICHAEL SIMMONS,

Defendant-Appellant.

UNPUBLISHED
January 21, 2000

No. 204006
Recorder's Court
LC No. 96-004759

Before: Jansen, P.J., and Saad and Gage, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529; MSA 28.797, and felonious assault, MCL 750.82; MSA 28.277. The trial court sentenced defendant to twenty to thirty years' imprisonment for the armed robbery conviction and a concurrent term of two to four years' imprisonment for the assault conviction. Defendant now appeals as of right, and we affirm.

Defendant first contends that the police lacked probable cause to arrest him, had no warrant or consent to enter his residence, and therefore that evidence regarding his subsequent participation in a police line up must be suppressed as the product of the illegal arrest. A person's right to be secure from unreasonable searches and seizures is guaranteed by both the state and federal constitutions. See *People v Smith*, 420 Mich 1, 18-19; 360 NW2d 841 (1984), quoting Const 1963, art 1, § 11 and US Const, Am IV. Without a warrant, a police officer may arrest a person when a felony has in fact been committed, and the officer "has reasonable cause to believe [that] the person committed it." MCL 764.15(1)(c); MSA 28.874(1)(c); *People v Suchodolski*, 22 Mich App 389, 394; 178 NW2d 524 (1970). Probable cause to arrest exists if the facts available to the officer at the moment of arrest would justify a fair-minded person of average intelligence to believe that the suspected person has committed a felony. *People v Oliver*, 417 Mich 366, 374; 338 NW2d 167 (1983); *Suchodolski, supra* at 394. When an officer has probable cause to believe that a felony has been committed and reasonable cause to believe that the defendant committed that felony, the arrest is lawful. *People v Romano*, 35 Mich App 135, 140; 192 NW2d 271 (1971).

The facts reveal that an eyewitness gave police the license plate number of the vehicle driven by the perpetrator. Detroit police investigator Shanahan traced the vehicle's plate number to a car rental

agency, which indicated that it had rented the vehicle to a Daniel Simmons. Shanahan then spoke to Daniel Simmons, who informed him that he did not rent the car in question. Indeed, Daniel told Shanahan that he had seen his brother, Donald Simmons, driving a car similar to that involved in the offense and that his brother had used Daniel's name on his driver's license. Daniel then gave Shanahan a photograph of his brother, the instant defendant. Detroit police officers Cook and Cole, who were dispatched to arrest defendant, had been informed by other officers that defendant was suspected of an armed robbery and felonious assault that occurred on January 14, 1996. Under these circumstances, probable cause existed to believe that a felony had been committed and that defendant was the perpetrator. *Oliver*, *supra*.

Defendant further claims that the arresting officers' warrantless entry into his apartment without consent rendered the arrest illegal. Even assuming that the officers' arrest was illegal, however, no error requiring reversal has occurred. Rather, defendant's sole remedy would constitute the suppression of any evidence obtained as a result of the illegal arrest. *People v Rice*, 192 Mich App 240, 244; 481 NW2d 10 (1991). The invalidity of an arrest does not deprive a court of jurisdiction to try a defendant. *Id*.; *People v Dalton*, 155 Mich App 591; 400 NW2d 689 (1986). Defendant sought to suppress the victim's identification of him at a line-up that was precipitated by his arrest. While evidence of the line-up identification was admitted at trial, the victim also provided an in-court identification. The victim testified repeatedly that she based her in-court identification on her close range observance of defendant over a period of approximately ten minutes while he struggled to steal her purse. The victim's in-court identification of defendant was not suppressible as the fruit of any allegedly illegal arrest. *United States v Crews*, 445 US 463, 472-473; 100 S Ct 1244; 63 L Ed 2d 537 (1980). Therefore, even if the police officers improperly entered defendant's apartment to effectuate the arrest, any impropriety was harmless in light of the victim's in-court identification of defendant. *Rice*, *supra*.

Defendant also challenges the photographic identification procedure employed by Shanahan. Defendant claims that Shanahan impermissibly suggested to the victim that defendant was her assailant when he showed her five photographs, one at a time, instead of presenting a full array of photographs for the victim to view simultaneously. A photographic identification procedure can be so suggestive that it deprives the defendant of due process of law. *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). The fairness of an identification procedure is evaluated in light of the total circumstances. *People v Lee*, 391 Mich 618, 626; 218 NW2d 655 (1974). The test is whether the procedure was so impermissibly suggestive that it creates a substantial likelihood of misidentification. *People v Kurylczyk*, 443 Mich 289, 306; 505 NW2d 528 (1993). In determining the likelihood of misidentification, factors to consider include the witness' opportunity to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. *Id*. The display of a single photograph combined with an indication that the person depicted has been arrested for the offense can be unduly suggestive. *Gray*, *supra* at 111. If a pretrial identification procedure was impermissibly suggestive, testimony regarding that identification is inadmissible at trial. *Kurylczyk*, *supra* at 303.

The photographic identification procedure in this case was not impermissibly suggestive. Prior to the photographic identification procedure, the victim was not told that the suspect's photograph would be among the array. Additionally, Shanahan did not suggest that the victim select any of the photographs. The mere fact that the victim was shown one photograph at a time as Shanahan placed them on her kitchen table did not render the photographic identification procedure impermissibly suggestive. This is not a case in which the victim viewed only a single photograph. Compare *Gray*, *supra*. Moreover, no evidence indicated that defendant's photograph stood out somehow from the other photographs in a manner suggesting that defendant was the perpetrator. Importantly, the victim testified that she got a good, close look at defendant during the incident in question. Furthermore, the photographic identification procedure occurred only three weeks after the incident. Because the totality of the circumstances reveals nothing impermissibly suggestive about the photographs or the way they were shown to the victim, we conclude that the trial court properly ruled that the photographic identification procedure was not unduly suggestive. *Kurylczyk*, *supra*.

With respect to defendant's statement that the line-up conducted at the police station was impermissibly suggestive because Shanahan told the victim prior to the line-up that "we think we have a suspect," we note that "[w]henever a witness is called in for a lineup that witness may infer that the lineup will contain possible suspects. The fact that the police stated the obvious hardly can be seen as an inducement of the witness to pick someone out of the lineup." *People v Smith*, 108 Mich App 338, 343-344; 310 NW2d 235 (1981).

Next, we conclude that the trial court did not abuse its discretion in denying defendant's motions for a mistrial and for new trial based on the prosecutor's failure to comply with a discovery order. *People v Manning*, 434 Mich 1, 7; 450 NW2d 534 (1990) (The grant or denial of a motion for mistrial rests in the trial court's sound discretion.); *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999) (A trial court's decision whether to grant a new trial is reviewed for an abuse of discretion.); *People v Davie (After Remand)*, 225 Mich App 592, 597-598; 571 NW2d 229 (1997) (The trial court's decision regarding the appropriate remedy for noncompliance with a discovery order requires inquiry into all the relevant circumstances, including the causes of the noncompliance and any showing by the objecting party of actual prejudice, and is reviewed for an abuse of discretion.). Because it appears from the record that the prosecutor did not know that witness Alice Wilder had participated in a photographic identification procedure, this case does not involve an intentional discovery violation. Furthermore, because defendant elicited from Wilder on cross-examination the circumstances surrounding the identification procedure and Wilder's failures to identify defendant, defendant suffered no prejudice from the prosecutor's failure to disclose this information before trial. See *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999) ("[A] preserved, nonconstitutional error is not a ground for reversal unless 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative."). Because the allegedly exculpatory evidence was fully presented to the jury, we conclude that the trial court did not abuse its discretion in denying defendant's motions for a mistrial and for new trial.

Defendant additionally raises several alleged instances of prosecutorial misconduct during closing argument. We have considered defendant's claims of prosecutorial misconduct and we

conclude that he was not denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). The comments made by the prosecutor during rebuttal closing argument responded to issues raised by defense counsel during his closing argument, and therefore do not constitute reversible error. *People v Sharbnow*, 174 Mich App 94, 100-101; 435 NW2d 772 (1989).

Defendant further avers that the prosecutor improperly elicited testimony from the victim that violated a pretrial order prohibiting "reference to complications/consequences of injury to [the victim's] fetus or anything associated with delivery as result of alleged offenses." We note, however, that the victim testified only that she was hooked up to a fetal monitor. She did not testify that she suffered any pregnancy complications or that her baby was injured during the armed robbery and assault. Even if the reference to the fetal monitor qualifies as somewhat improper, it was so fleeting and innocuous that it did not deny defendant a fair and impartial trial given the other substantial evidence of defendant's guilt presented at trial. MCL 769.26; MSA 28.1096; *Lukity, supra*.

Next, we reject defendant's claim that he is entitled to a new trial on the basis of newly discovered evidence. As defendant admits, the evidence in question, the testimony of an alleged alibi witness, his girlfriend, was not newly or recently discovered. Defendant concedes that he was fully aware of his girlfriend's potential testimony prior to trial. Therefore, he is not entitled to a new trial on the basis of newly discovered evidence. *People v Barbara*, 400 Mich 352, 362-363; 255 NW2d 171 (1977); *People v Canter*, 197 Mich App 550, 559; 496 NW2d 336 (1992).

Lastly, defendant contends that he was denied the effective assistance of counsel because his attorney failed to subpoena defendant's girlfriend, Soyna Harris, to provide alibi testimony. Because there was no evidentiary hearing on defendant's claim of ineffective assistance of counsel, this Court's review is limited to mistakes apparent on the existing record. *People v Darden*, 230 Mich App 597, 604; 585 NW2d 27 (1998). This Court must determine whether the existing record reveals that defense counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced defendant that it deprived him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

There is a presumption that counsel provided effective assistance, and the defendant bears the heavy burden of overcoming that presumption. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). The defendant must also overcome the "strong presumption that counsel's assistance constituted sound trial strategy." *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). The decision whether to present a particular witness is a matter of trial strategy that may constitute ineffective assistance only when a failure to present the witness deprives the defendant of a substantial defense. *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990).

Defendant claims on appeal that Harris would have offered testimony to indicate that he was with her at the time of the charged offense. Although nothing in the lower court record supports this contention, defendant attached to his brief on appeal two unsworn, recorded statements Harris made, one dated November 30, 1996, before trial, and one dated June 2, 1997, after trial and sentencing. Both of these statements contain Harris' contention that defendant was present with her during the early

morning hours of January 14, 1996, the time period when the crimes occurred. Defendant also attached to his brief on appeal an affidavit of his trial counsel, who acknowledged that before trial he had filed an alibi notice listing Harris as an intended witness. While defendant and his counsel had knowledge of Harris, defense counsel's affidavit indicates that he did not present Harris as a witness because "[p]rior to trial, I was informed by Ms. Harris that she did not intend to testify on the Defendant's behalf in support of his defense of alibi due to some animosity that had arisen between Ms. Harris and the Defendant." Defendant in his brief on appeal and Harris in her second recorded statement acknowledge that they had a falling out. This Court will not second guess trial counsel on matters relating to trial strategy. *Pickens*, *supra* at 330. In light of the undisputed fact that defendant and Harris had a falling out prior to trial and that Harris bore animus against defendant, we cannot conclude that the decision not to call Harris represents unsound trial strategy.

Defendant also argues, in a pro se supplemental brief, that counsel was ineffective for failing to seek suppression of Alice Wilder's in-court identification of defendant after defense counsel discovered a tainted pretrial identification procedure, and when the record clearly indicated that Wilder had no independent basis for making an in-court identification of defendant. Our review of the record reveals that even if the photographic identification process was tainted, however, Wilder's testimony sufficiently demonstrates that she possessed an independent basis for her in-court identification of defendant. Therefore, defense counsel was not required to make a motion to suppress her testimony on the grounds that there was no independent basis for Wilder's in-court identification. Counsel is not required to argue a frivolous or meritless motion.[1] *Darden*, *supra* at 605.

Affirmed.

/s/ Kathleen Jansen
/s/ Henry William Saad
/s/ Hilda R. Gage

[1] To the extent that defendant additionally argues that defense counsel should have moved to suppress the car rental agent's in-court identification, after reviewing the record we likewise find no error in this respect. Even assuming arguendo that defense counsel unreasonably failed to object to the car rental agent's in-court identification of defendant, in light of the other evidence presented at trial we find no reasonable likelihood that defendant suffered any prejudice or was deprived of a fair trial. *Pickens*, *supra*.